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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DALE ROBERTS YATES, *Petitioner,*

v.

PARKER EVATT, Commissioner,
South Carolina Department of Corrections, and the
ATTORNEY GENERAL OF SOUTH CAROLINA,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR THE STATE OF CALIFORNIA AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the burden-shifting instructions given at petitioner's trial constituted harmless error under *Rose v. Clark*.

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INTEREST OF THE STATE OF CALIFORNIA

We ask the Court to clarify the harmless error test of *Rose v. Clark*, 478 U.S. 570 (1986), as it may apply

(1) to judgments resting on alternative theories of guilt, where one theory involved an unconstitutional burden-shifting presumption, Pet. Brief on the Merits 19, 29-30, and

(2) to judgments in which the jury was not required to find a necessary element and made no equivalent finding, but overwhelming evidence arguably removes any reasonable possibility that a correctly instructed jury would have rendered a verdict more favorable to the defendant. Pet. Brief on the Merits 16, 19, 31-32.

The resolution of these questions will affect California judgments resting on such alternative theories of guilt as malice murder and felony murder and aiding and abetting,

or involving omission of instructions or misinstruction upon elements of a crime.

SUMMARY OF ARGUMENT

Uncertainty exists concerning harmless error's application to jury trial rights because the Court has not yet come to grips with the problem of how a judicial finding of harmless error can be reconciled with the defendant's right to a *nonjudicial* decisionmaker. The fear is that for a judge to dismiss as harmless an abridgment of a defendant's right to a nonjudicial decisionmaker is to do little more than compound the error, for the effect may be that "the wrong entity judged the defendant guilty." *Rose v. Clark*, 478 U.S. at 578. This concern is particularly acute when the jury may not have made an essential finding, or when the verdict rests on alternative theories of guilt, one of which is untenable. *See, e.g., Boyde v. California*, 494 U.S. ___, 108 L.Ed.2d 316, 328-29, 110 S.Ct. 1190 (1990) (Rehnquist, C.J., for the Court); *Carella v. California*, 491 U.S. __, 105 L.Ed.2d 218, 109 S.Ct. 2419 (1989) (Scalia, J., conc.); *Pope v. Illinois*, 481 U.S. 497 (1987) (Stevens, J., diss.).

To resolve this, we will look to the constitutional interests at stake to determine whether application of harmless error invades or protects those interests.

Our thesis is that where it is clear—from evidence, jury findings, concessions, or other circumstances—that no jury could rationally find in the defendant's favor, no legitimate interest of the defendant in a jury trial is abridged by affirmance.

> [A] court should presume . . . that the . . . jury act[s] according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. *A defendant has no entitlement to the luck of a lawless decisionmaker*. . . .

Strickland v. Washington, 466 U.S. 668, 694-95 (1984) (emphasis added).

This test is one that judges traditionally employ in deciding whether issues may go to a jury for decision. When there is no rational basis on which the jury could find in accordance with the instruction in issue, an instruction committing that issue to the jury for decision is unwarranted. *E.g., Hopper v. Evans*, 456 U.S. 605, 611-612 (1982); *United States v. Jackson*, 726 F.2d 1466, 1468 (9th Cir. 1984). "This standard protects the right of the defendant to have the jury weigh the evidence and the credibility of witnesses when the evidence raises a factual dispute and, at the same time, protects against improper verdicts." *Id.*

We do not suggest that courts should not or need not present all essential fact questions to the jury for decision. *See generally In re Winship*, 397 U.S. 358, 363-64 (1970); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); *Carpenters v. United States*, 330 U.S. 395 (1947). We do suggest that the "reasonable possibility" test of *Chapman v. California*, 386 U.S. 18 (1965), "protects the right of the defendant to have the jury weigh the evidence and the credibility of witnesses" whenever there is any rational possibility that the jury could find in his favor.

Chapman effectively protects a defendant's right to trial by jury, for it commands reversal whenever there is any reasonable possibility of benefit, and he is entitled to no more.

ARGUMENT

A. THE LAW OF HARMLESS ERROR SHOULD BE SETTLED RESPECTING ABRIDGMENT OF JURY TRIAL RIGHTS.

In *Rose v. Clark*, 478 U.S. 570, this Court emphatically reaffirmed that harmless error analysis is an ally, not an enemy, of constitutional rights.

> Our application of harmless-error analysis in these cases has not reflected a denigration of the constitutional rights involved. Instead, as we emphasized earlier this Term: "The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than upon the virtually inevitable presence of immaterial error. . . . 'Reversal for error, regardless of the effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.'"

478 U.S. at 577, *quoting Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

Yet some errors, the Court recognized, "necessarily render a trial fundamentally unfair" and require reversal without regard to evidence of guilt. *Id.* "An error is fundamental if it undermines confidence in the integrity of the criminal proceeding." *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 810 (1987). Denial of counsel, reliance upon a coerced confession, adjudication by a biased judge, and racial discrimination which "undermines the structural integrity of the criminal tribunal

itself," have all been found fundamental in this sense. *Rose v. Clark*, 478 U.S. at 578; *Vasquez v. Hillery* 474 U.S. 254, 263-64 (1986). "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. at 577-78 (citation omitted).

When a defendant's right to a jury is "altogether denied," as where a court directs a verdict, the error cannot be deemed harmless simply because the evidence establishes guilt: "the error in such a case is that the wrong entity judged the defendant guilty." *Id.* at 578; *accord, id.* at 580 n.8; *see Carella v. California*, 105 L.Ed.2d at 223 (jury right is a "structural guarantee . . . that reflects a fundamental . . . reluctance to entrust plenary powers over . . . life and liberty . . . to . . . judges") (Scalia, J., conc.).

When the right to jury trial is *not* "altogether denied," however, harmless error findings may be appropriate. *Rose v. Clark* made clear that *conflicting* instructions, one of which leaves open a reasonable possibility that the jury did not find a fact necessary to guilt, do not amount to a denial of jury trial "altogether." It upheld application of *Chapman v. California* in that circumstance, reasoning that a court need not reverse simply because an error, "*in theory*, may have altered . . . the terms under which the jury considered the defendant's guilt or innocence, and therefore . . . theoretically impair[ed] the defendant's interest in having a jury decide his case." 478 U.S. at 582 n.11 (emphasis added). Many errors have that effect, yet have been held harmless when "*in practice* [they] clearly had no effect upon the outcome." *Id.* (emphasis added).

Ultimately, the Court looked to the practical effect of the error upon the defendant, and not to the procedural mechanism by which the error occurred.

Where no rational jury would have needed to rely on an erroneous instruction, it would be "'an extraordinary perversion of justice'" to reverse without demonstration of prejudice. The error, in such circumstances, is "superfluous." *Id.* at 581 & n.10.

Yet *Rose v. Clark* ambiguously rested its application of harmless error on the form of error—a mandatory rebuttable presumption that "'does not remove the issue . . . from the jury.'" *Id.* at 580 & n.8. This distinction, though useful in that case, left lower courts without reliable guidance for other forms of jury trial error. In particular, *Rose* left open the question of whether *Chapman* can apply where an element or other critical fact is completely omitted from instructions, rather than submitted under conflicting instructions.

This question appeared to have been resolved in *Pope v. Illinois*, 481 U.S. 498, for it is certain that the *Pope* jury did not find an element necessary to conviction. A key element was incorrectly defined; the necessary issue was never put to the jury; the instructions were not conflicting (one correct, one incorrect), but explicitly incorrect. The jury was instructed that "serious literary, artistic, political or scientific value" should be determined by reference to ordinary Illinois adults, rather than to a more generic "reasonable person." The Court found this distinction sufficiently weighty to constitute constitutional error, but nonetheless upheld harmless error analysis, stating:

> To the extent that cases prior to *Rose* may indicate that a conviction can never stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, see, e.g., *Cabaña v. Bullock*, 474 U.S. 376, 384 (1986), after *Rose*, they are no longer good authority.

Pope v. Illinois, 481 U.S. at 504 n.7. Relying on *Rose* or *Pope*, numerous state and federal decisions have applied *Chapman* to instructional errors that removed or omitted elements or directed findings concerning elements.[1]

However, *Pope* also had in it language asserting that it was *not* a "complete omission" case, but more akin to a "conflicting instructions" case:

> The situation here is comparable to that in *Rose v. Clark* . . . . The error in *Rose* did not entirely preclude the jury from considering the element of malice . . . . [¶] Similarly, in the present cases the jurors were not precluded from considering the question of value: they were informed that to convict they must find, among other things, that the magazines petitioners sold were utterly without redeeming social value.

Pope v. Illinois, 481 U.S. at 502-03 (citations omitted).

Evidently, it was enough to justify harmless error analysis that the jury was told that it must find value, even though, so to speak, it was instructed to measure value in pounds rather than dollars. The jury issue was not "altogether" removed: there remained a convertible substitute—convertible by judges without unduly infringing upon the defendant's right to jury trial.

Recently, writing for four justices, Justice Scalia amplified this ambiguous explanation of *Pope* and *Rose*. In *Carella v. California*, 105 L.Ed.2d 218, he noted he had

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1. California cases finding omission of elements to be harmless error include, for example, *People* v. *Joiner*, 204 Cal.App.3d 221, 251 Cal.Rptr. 63 (1988) (penetration, rape); *People* v. *Gary*, 189 Cal.App.3d 1212, 1217, 235 Cal.Rptr. 30 (1987) (act forbidden by law, DUI); *People* v. *Lopez*, 188 Cal.App.3d 592, 600-02, 233 Cal.Rptr. 207 (1986) (knowledge, resisting arrest). But see *People* v. *Lawson*, 189 Cal.App.3d 741, 751-54, 234 Cal.Rptr. 557 (1987); *People* v. *McElrath*, 175 Cal.App.3d 178, 185, 220 Cal.Rptr. 698 (1985).

joined the *Pope* majority "only because I believed that *no rational juror could plausibly have found* the magazines utterly lacking in value under a community standard and come to a different conclusion under a reasonable person standard." *Id.* at 225 (emphasis altered). This part of his explanation, a standard application of *Chapman*, looked to practical effect.

However, he made clear, the essential prerequisite to such a *Chapman* analysis is a "closely related" jury finding.

> When the predicate facts relied upon in the instruction, or other facts necessarily found by the jury, are so *closely related* to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings is *functionally equivalent* to finding the element required to be presumed. The error is harmless because it is "beyond reasonable doubt," Chapman v. California, *supra*, 386 U.S. 18, 24 (1967), that *the jury found* the facts necessary to support the conviction.

Id. at 225-26 (emphasis added).

In short, the sine qua non of this analysis is a "closely related" or "functionally equivalent" jury finding.[2] Under this construction of *Rose* and *Pope*, for error affecting the defendant's right to a nonjudicial factfinder to be harmless, *a jury* must have passed upon the required issue, or come sufficiently close in its other findings, that, considering the weight of the evidence, no reasonable possibility of a different *jury* finding can be found to exist.

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2. *Cf. People* v. *Sedeno*, 10 Cal.3d 703, 721, 518 P.2d 913, 112 Cal.Rptr. 1 (1974) (omission of lesser included offense instruction is harmless where jury necessarily resolved factual question adversely to defendant under other, proper instructions), *overruled on other grounds*, *People* v. *Flannel*, 25 Cal.3d 668, 603 P.2d 1, 160 Cal.Rptr. 84 (1979).

Indeed, it must have come so close that one can conclude the defendant's jury—not the "average jury" specified for *Chapman* analysis[3]—"found" the necessary facts.

One might ask why we need *Chapman* or *Rose v. Clark*. Where is the error if the jury "found" the necessary fact? It is precisely because a reasonable prospect exists that the jury did *not* find the necessary fact that constitutional error exists. *See Boyde v. California*, 108 L.Ed.2d at 329 ("reasonable likelihood"); *Sandstrom v. Montana*, 442 U.S. 510, 519, 524 (1979) ("reasonable possibility"). *Chapman* analysis thus begins with a "reasonable likelihood" that the jury did not find a necessary fact. To posit that the analysis can succeed only if one finds it patent that "the jury found" the missing fact is conceptually unclear at the least, if not necessarily circular.

One explanation could stem from the fact that *Sandstrom* measures the potential constitutional impact of presumption error by looking only to the words of the instruction without regard to the evidence or other findings; constitutional error exists if prejudice, in this isolated perspective, is reasonably likely, rather than actual. *Boyde v. California*, 108 L.Ed.2d at 329; *Francis v. Franklin*, 471 U.S. 307, 315 (1985). *Chapman* thus can serve to place the potential constitutional error into the context of the evidence, and, at least where "functionally related" findings exist, to establish that the constitutional prejudice latent in the defective instruction did not in fact occur.[4]

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3. *E.g.*, *Pope* v. *Illinois*, 481 U.S. at 503 n.6; *Harrington* v. *California*, 395 U.S. 250, 254 (1969).

4. *But see Rose* v. *Clark*, 478 U.S. at 582 n.11 ("Harmless-error analysis addresses a different question: what is to be done about a trial error that, in theory may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the

But what rule should apply when constitutional error unmistakably *did* occur, as where the instructions completely omit a necessary element and no equivalent finding exists?

The *Carella* minority would apparently hold this automatic reversible error, for it is plainly not enough to the minority that a reviewing court might believe the evidence leaves no reasonable possibility of a finding favorable to the defendant, for that would measure the prejudice in terms of the reliability of the guilt finding, not in terms of the defendant's interest in a nonjudicial decisionmaker:

> "[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been *found by a jury* according to the procedure and standards appropriate for criminal trials." Bollenbach v. United States, 326 U.S. 607, 614 (1946). "Findings made by a judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime." Cabana v. Bullock, 474 U.S. 376, 384-385 (1986).

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outcome?); *Pope* v. *Illinois*, 481 U.S. at 503 n.6 ("We do not understand *Rose*, as the dissent apparently does, to be based on the fiction that a reviewing court could say beyond all reasonable doubt that the jury *in fact* did not have the impermissible burden-shifting instruction in mind when it concluded that the defendant killed with malice. To say that the jury 'would have found it unnecessary to rely on the presumption,' or that the impermissible instruction was 'superfluous,' is not to say that the reviewing court can retrace the jury's deliberative processes but that the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same.") (citation omitted).

Carella v. California, 105 L.Ed.2d at 224 (Scalia, J., conc.) (emphasis added).

> [I]t would not matter, for purposes of assuring Carella his jury-trial right, whether the record contained overwhelming evidence that he in fact embezzled the car. For nothing in the instruction would have directed the jury, or even permitted it, to consider and apply that evidence in reaching its verdict. And the problem would not be cured by an appellate court's determination that the record evidence *unmistakably* established guilt, for that would represent a finding of fact by judges, not by a jury. As with a directed verdict, "the error in such a case is that the wrong entity judges the defendant guilty." Rose v. Clark, supra, at 578.

Carella, 105 L.Ed.2d at 224 (Scalia, J., conc.) (emphasis in original).

Justice Scalia was joined by three justices, and Justice Stevens stated similar views in *Pope*. 481 U.S. at 509-10 ("The harmless-error doctrine may enable a court . . . to *preserve* a jury's findings, but it cannot constitutionally *supplement* those findings.").

The *Carella* Court did not endorse either interpretation of *Pope* and *Rose*. The per curiam opinion simply quoted from *Rose v. Clark*:

> "When a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt. In many cases, the predicate facts conclusively establish intent, so that *no rational jury could find* that the defendant committed the relevant criminal act but did not intend to cause injury. . . . In that event the erroneous instruction is simply superfluous: *the jury has found*, in Winship's words, 'every fact necessary'

to establish every element of the offense beyond a reasonable doubt."

Id. at 222, *quoting Rose v. Clark*, 478 U.S. at 580-81 (emphasis added).

In short, *Rose*, *Pope* and *Carella* leave uncertainty. What appeared to have been decided in *Rose* and *Pope* remains just as disputed as it was when *Connecticut v. Johnson*, 460 U.S. 73 (1983), *Koehler v. Engle*, 466 U.S. 1 (1984), and *Francis v. Franklin*, 471 U.S. 307, were before the Court. We suggest that relief may be found in resort to first principles.

B. The Defendant's Interest in Trial by Jury Is Not a Right to an Irrational Verdict: His Ultimate Legitimate Interest Is in Justice According to Law and Reason.

The right to trial by jury protects defendants from judicial decisionmaking in essential matters. It is a "structural guarantee . . . that reflects a fundamental . . . reluctance to entrust plenary powers over . . . life and liberty . . . to . . . judges." *Carella v. California*, 105 L.Ed.2d at 223 (Scalia, J., conc.).

A jury reflects the community, and its sense of justice, in a way that the judiciary cannot and is not intended to reflect. The right to jury trial not only ensures enlightened and reliable factfinding through the common sense and experience pooled in the jury, but also ensures that the *law* is interpreted and applied in light of community values, an interest once recognized expressly, *e.g.*, *Brady v. Maryland*, 373 U.S. 83, 89 (1963); *United States v. Wilson*, 28 Fed. Cases 699, 708 (Cir. Ct. E.D. Pa. 1830) (No. 16,730), and still acknowledged sub silentio in the doctrines of jury nullification and the "reasonable man." *See, e.g., People v. Dillon*, 34 Cal.3d 441, 490, 668 P.2d 697, 194 Cal.Rptr. 390 (1983) (Kaus, J., conc.); *Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 223, 157 P.2d 372 (1945) (Traynor, J., for the Court); *Toschi v. Christian*, 24 Cal.2d 354, 365, 149 P.2d 848 (1944) (Traynor, J., diss.).

We take it as given, therefore, that findings by a jury are inherently of a different quality than findings by a judge. "[M]any things are revealed to the humble that are hidden from the great."[5] The jury, as "'conscience of the community,'" applies values that may not be shared by a judge. Its "common" sense and experience may be superior to or at least different from that of a judge. As "peers" of the defendant, jurors also may possess special insight and understanding. Findings by a judge simply are not of the same kind, whatever the evidence. This difference has meaning not only to the jury's factfinding, but also to its application of law to facts.

The function of the jury encompasses more than assurance of reliable verdicts. It elevates the quality of justice by making the community its measure. Moreover, what may seem reliable to a judge can be different from what seems reliable to a jury. That is part of the reason why jury trial is a right.

In short, judicial interference with the right to trial by jury is seldom immaterial. When there is discretion to be exercised, whether that discretion involves credibility,[6]

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5. A. Stevenson, The Wit and Wisdom of Adlai Stevenson (E. Hanna, H. Hicks & T. Koppel, eds., 1965).

6. Credibility assessments are the jury's exclusive function, and a reviewing court may not intrude far into credibility assessment without denying the right to jury. *See Delaware* v. *Van Arsdall*, 475 U.S. at 680 (confrontation denial is not measured by impact on the reliability of the outcome, but on whether, in light of the barred cross-examination, "[a] reasonable *jury* might have received a significantly different impression of . . . credibility") (emphasis added).

evidence or law within the jury's purview, the jury must exercise the discretion.

Nonetheless, *Rose v. Clark* correctly looks to the practical significance of error, not to mere theoretical effect. *Rose v. Clark*, 478 U.S. at 582 n.11. There *are* cases in which the issue to which the error relates was nominal rather than real. A harmless error finding does no damage to a defendant's interest in a jury factfinder if the error did not concern any issue that was contested or contestable, but only an issue that could not rationally have been decided by a jury advantageously to the defendant. One may justly hold the right to trial by jury is not denied, or the denial is harmless, when the defendant's interest is not abridged in any realistic sense.

Any other view does damage to public respect for the law. *id.* at 577; *Delaware v. Van Arsdall*, 475 U.S. at 681. To justify a rule of reversal per se despite the absence of any practical impact upon the defendant, one must take the view either (1) that the right at stake is so important, the risk of prejudice so likely or elusive, that

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But *Chapman* still was applied in *Van Arsdall* to error that by definition affected credibility. *Id.* at 680-84; *see also Rose* v. *Clark*, 478 U.S. at 582 n.11 (many errors "alter the terms under which the jury considered the defendant's guilt, and therefore . . . theoretically impair the defendant's interest in having a jury decide his case," yet *Chapman* applies).

"The correct [*Chapman*] inquiry," the Court held in *Van Arsdall* with respect to a denial of cross-examination which might have exposed witness bias,

> is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends on a host of factors . . . .

475 U.S. at 684. The same method of analysis may apply to other credibility issues pertinent to harmless error assessment.

the cost of reversing some cases for essentially irrational reasons must be accepted in order to protect the right in other cases, *e.g., United States v. Cronic*, 466 U.S. 648, 659 & n.25, or (2) that the right of a defendant to jury trial includes a right to the chance of an irrational verdict, i.e., to jury nullification.

When there is not even a reasonable possibility that a jury would have ruled favorably to the defendant but for the error or omission, a defendant's claim for reversal must necessarily rest on an implicit assertion of a right to an irrational verdict. We do not deny the jury's power to acquit in the teeth of the facts and law, but we do deny any constitutional *right* to such an acquittal. The people, through their juries, can justly be viewed as a final democratic check upon the perceived excesses of government through "nullification," compromise, or other ad hoc adjustment of the law to the perceived requirements of justice.[7] The existence of such a power *in the community* entails no necessary acknowledgement of a right *in the defendant* to the exercise of that power.

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7. The institution of trial by jury—especially in criminal cases—has its hold upon public favor chiefly for two reasons. The individual can forfeit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. Moreover, since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of the law, tempering its rigor by the mollifying influence of current ethical conventions. A trial by any jury, however small, preserves both these fundamental elements and a trial by a judge preserves neither, at least to anything like the same degree.

United States ex rel. McCann v. *Adams*, 126 F.2d 774, 775-76 (2d Cir.), *rev'd on other grounds*, 317 U.S. 269 (1942).

He is guaranteed justice according to law, not more. "Nullification" and other ameliorations of criminal charges are public powers, exercised by the public on behalf of the public alone, though the defendant will benefit.

Hence, the Court taught in *Strickland*,

> [A] court should presume . . . that the . . . jury act[s] according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, caprice, "nullification," and the like. *A defendant has no right to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed.* The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend upon the idiosyncracies of the particular decisionmaker . . . .

466 U.S. at 694-95 (emphasis added).

C. Neither a Jury's Failure to Find an Essential Element, Nor the Absence of "Functionally Equivalent" Findings, Should Compel Automatic Reversal.

Since the Court already has declined to recognize a right to an irrational verdict, what is left is to consider whether a rule of reversal per se, or, as a middle ground, a rule that "predicate" or "functionally equivalent" findings must exist, is so necessary to protection of the defendant's right to trial by jury that the cost of reversing some cases pointlessly must be accepted.

Chapman is a sharp and effective tool. It protects the defendant whenever there exists any rational possibility

that a correctly instructed jury would find in his favor. It preserves to him the benefit of every reasonable possibility of advantage.

The *Chapman* test, after all, was formulated with a view to controlling courts perhaps hostile to constitutional rights, and to limiting "unfair and mischievous results." *Cf. Chapman v. California*, 386 U.S. at 21-22, 50; Traynor, The Riddle of Harmless Error 43 (1970). It generally has proved an adequate safeguard against even wilful insensitivity.

No test of prejudice or rule of reversal is perfect; each involves costs. A lower court will sometimes exercise its judgment differently from how this Court might exercise its judgment, particularly if the manner of applying the test of prejudice is unclear, as in this case. "[M]alleability" and "inconsistent . . . results" may sometimes seem a "plague" and a "confusion," see *Francis v. Franklin*, 471 U.S. at 322-23 n.8, but that judgment may vary does not impeach the propriety of its exercise. The consistency demanded by the Constitution is not that of regular reversal or affirmance, but of respect for basic constitutional principles. Just as we assume juries ordinarily will respect the instructions of judges, so we must also assume that judges will respect the instruction of the Constitution. It cannot be generally supposed that the judges of inferior courts hold constitutional values in any less esteem than the members of this Court. Were the manner of its application to this kind of error clarified, the *Chapman* test would be a strong and sufficient protection of the right to trial by jury.

There is a danger in the use of "mechanical formulas that tend to replace discriminating judgment" quite as severe as the danger that harmless error rules might swallow up constitutional rights. "A rational test . . . must operate to preserve such rights even as it serves to screen

out innocuous errors." Traynor, The Riddle of Harmless Error 19-20 (1970).

If reversal is neither necessary nor wise in every case, should there not be required at least some "predicate" finding or "functionally equivalent" finding from which a court can conclude that, though the jury may not have passed upon the essential issue necessary to conviction, it at least considered some fact question closely related to the omitted fact and found against the defendant?

When no rational jury could possibly find in the defendant's favor, reversal for lack of "predicate" or "functionally equivalent" findings serves only to offer the defendant a chance of an irrational verdict. While "closely related" findings offer solace to courts sensitive to denial of jury rights, and some assurance against prejudice, other reliable means of guarding against prejudice are available, including weighing the evidence. It makes no sense to restrict the *Chapman* test's applicability to the single circumstance of "closely related" findings. It is an essentially arbitrary limit upon the exercise of discriminating judgment.

It is certain the *Pope* jury did not find that a reasonable person would find serious literary, artistic, political, or scientific value in the allegedly obscene material, for it was never instructed that it must so find. Indeed, it was instructed to find something else: the value an ordinary Illinois adult would place on the material. Although the difference between what it actually found and what the defendant had a right to have it find may have been subtle, it was judged significant, for the Court found constitutional error. There is no escaping the fact that the jury did not find an essential element.

Justice Scalia joined that opinion because he believed "that no rational juror could plausibly have found the magazines utterly lacking in value under a community

standard and come to a different conclusion under a reasonable person standard." *Carella v. California*, 109 S.Ct. at 2423. His test looked both to the weight of the evidence as *Chapman* does and to the existence of "functionally equivalent" jury findings:

> When the predicate facts relied upon in the instruction, or other facts necessarily found by the jury, are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding the ultimate fact, making those findings is functionally equivalent to finding the element required to be presumed. The error is harmless because it is "beyond a reasonable doubt," *Chapman v. California*, 386 U.S. 18, 24 (1967), that *the jury found the facts necessary to support the conviction.*

Id. (emphasis added).

With respect, this conclusion should be reconsidered. The jury did *not* find the "facts necessary to support the conviction." It found a highly similar fact. A court might well be able to conclude in light of that finding and the weight of the evidence that no rational jury could fail to find the missing fact, were it correctly instructed, but it still is a court that supplies that finding, not the jury.

The "functionally equivalent" test appears to be a special case of *Chapman* analysis that ultimately depends not upon the actual existence of a jury finding of a necessary element, but upon an analysis of "reasonable possibilities" in light of the evidence and the totality of circumstances, including the existence of a closely related finding. Other equally reliable special cases of *Chapman* analysis independent of "functionally equivalent" findings certainly exist. The plurality in *Connecticut v. Johnson*, 460 U.S. at 87, accepted acquittal or concession of intent as circumstances also justifying findings of harmless

error,[8] and other courts have relied on other factors. "Whether such an error is harmless in a particular case depends upon a host of factors . . . ." *Delaware v. Van Arsdall*, 475 U.S. at 684.

If the evidence in *Pope*, taken in conjunction with such other circumstances, could justify a finding of harmless error despite the failure of the jury to find the necessary element, why may not evidence alone justify finding harmless error when the evidence leaves no reasonable doubt that a correctly instructed jury would find all necessary facts? "[T]here may be cases," for example, "where the parties recognized that intent to kill was in issue, presented all evidence at their command on that issue, and in which the record not only establishes the necessary intent as a matter of law but shows the contrary evidence not worthy of consideration." *People v. Garcia*, 36 Cal.3d 539, 556, 684 P.2d 826, 205 Cal.Rptr. 265 (1984).[9]

In either case, the determinative question is whether "'on the whole record'" there is a reasonable possibility that a correctly instructed jury would find for the defendant. *Rose v. Clark*, 478 U.S. at 583. In either case, the defendant obtains the benefit of every rational possibility. In neither case, does he have a right to more.

If requiring "predicate" findings or "functionally equivalent" findings does not benefit any legitimate interest of the defendant, who does benefit?

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8. *But see Rose* v. *Clark*, 478 U.S. at 583 (harmless error does not turn on whether defendant conceded the issue, but on consideration of the entire record).

9. "Evidence not worthy of consideration" is evidence that is not "substantial," i.e., evidence that would not support a rational finding, viz., of reasonable doubt. *See People* v. *Wickersham*, 32 Cal.3d 307, 325, 650 P.2d 311, 185 Cal.Rptr. 436 (1982); *People* v. *Flannel*, 25 Cal.3d 668, 684-85, 603 P.2d 1, 160 Cal.Rptr. 84 (1979).

Such a requirement *could* serve as a blurry line dividing what are perhaps more limited abridgments of jury trial rights from perhaps more sizable abridgments of jury trial rights. We say "blurry" because "predicate," "closely related" and "functionally equivalent" are not self-defining terms. Obviously, a "functionally equivalent" finding is not the same finding as the missing finding. The gap between them seemingly is bridged with evidence: otherwise, one takes issue with *Rose v. Clark* itself. See *Rose v. Clark*, 478 U.S. at 579, 583 ("Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed"). A finding would seem to be "functionally equivalent" to a missing finding when, given the evidence and other circumstances, no rational juror could plausibly find the fact found and come to a different conclusion as to the missing fact. *See Carella v. California*, 105 L.Ed.2d at 225-26 (Scalia, J., conc.) How far can a "closely related" finding differ from the missing fact finding? Evidently, as far as the evidence will stretch.

Moreover, the apparent premise of the *Carella* concurrence—that a mandatory presumption instruction upon a contested element is susceptible of harmless error review because it is less prejudicial than an omission of instructions concerning an uncontested element—is exceedingly doubtful. *See id.* at 226-27 ("jury's failure to make any factual determination of the elemental fact" is quite different). And to what purpose, when in neither case has the right to jury trial been "altogether denied"?

"Predicate" and "functionally equivalent" findings *do not* serve to insure that "'guilt has been found by a jury according to the procedure and standards appropriate for criminal trials,'" *id.* at 224, *quoting Bollenbach v. United States*, 326 U.S. 607, 614 (1946), for by definition the jury has not been required to find all essential facts "'according

to the procedure and standards appropriate for criminal trials.'" The *Bollenbach* rule is a rule of reversal per se, and is not a means of applying or ordering a rule of harmless error.

When a jury has been provided to a defendant but error affecting necessary jury findings nonetheless has occurred, and when on review it is clear beyond doubt—from evidence, jury findings, concessions, or whatever source—that no jury could rationally find in the defendant's favor, then no legitimate interest of the defendant in a jury trial is abridged by affirmance and no public interest is served by a pointless reversal.

Courts applying a harmless error test to jury issues must be sensitive to the unique abilities and responsibilities of a jury, and to any potential difference that might exist between a jury's values and view of what is just and rational and the court's. It is not simply the reliability of the verdict as it appears to a judge that is the test; it is, rather, a question of the reliability and justice of the verdict as it might appear to a jury. To affirm, it must be "clear beyond a reasonable doubt that if the jury had [been instructed correctly] *its* verdict would have been the same." *Pope v. Illinois*, 481 U.S. at 503 n.6 (emphasis added). Where confidence in the integrity of the *jury's* verdict is undermined, the judgment should be reversed.

The sensitivity this analysis requires does not place it beyond judicial competence, for *Chapman* in this review context expresses a familiar standard that trial judges employ daily in deciding whether issues must go to a jury for decision. When there is no rational basis on which the jury could find in accordance with an instruction in issue, committing the issue to the jury is unwarranted. *E.g., Hopper v. Evans*, 456 U.S. at 611-612 (1982); *United States v. Jackson*, 726 F.2d at 1468. "This standard protects the right of the defendant to have the jury weigh

the evidence and the credibility of witnesses when the evidence raises a factual dispute and, at the same time, protects against improper verdicts." *Id.*

We do not overlook the danger that intrusion into the jury function can leave the right to jury trial a shell without substance. It is plain there is a point past which courts cannot go in overlooking error without undermining the dignity of the right and eroding faith in the structural integrity of the criminal process. But *Chapman*, we believe, is a better guarantee that the real substance of the jury right will be afforded defendants than any arbitrary scheme limiting *Chapman* to particular avenues of error.

In short, whether the case involves mandatory presumptions (*Rose*), conclusive presumptions (*Carella*), misdescription of elements (*Pope*), or omission of elements (*Yates*, see Pet. Brief on the Merits 16, 19, 31-32), i.e., even in cases where the jury has not necessarily made "functionally equivalent" findings, *Chapman* gives the defendant the benefit of every reasonable possibility of a favorable finding, and he is entitled to no more.

D. The Existence of Alternative Theories Should Not Compel Automatic Reversal.

Petitioner maintains that the instructions given by the trial court permitted the jury to convict him under alternative theories, one based upon a finding he himself had malice, the other based on imputed liability for the malice of his accomplice. Citing *Bollenbach v. United States*, 326 U.S. at 614, and *Stromberg v. California*, 283 U.S. 359, 367-68 (1931), he concludes the errors are "prejudicial as a matter of law." Pet. Brief on the Merits 19, 29-30.

The *Bollenbach* decision was overruled sub silentio by *Rose v. Clark*, and the somewhat broader principle of *Stromberg* was called into serious question. Both cases predate *Chapman* and are expressions of the general rule of automatic reversal that prevailed before the Court and Congress accepted the legitimacy of harmless error. *See generally Kotteakos v. United States*, 328 U.S. 750, 759-65 (1946).

The debate in *Rose v. Clark* turned on the question of whether these decisions retained validity in presumptions cases. The jury in *Rose*, and in each of the three similar preceding cases in which the Court had deadlocked, had received instructions that permitted it to find malice either from the evidence or by way of an unconstitutional, burden-shifting presumption.

By definition, there was a reasonable possibility that one or more jurors had relied upon the unconstitutional theory; that was what made it constitutional error. *Sandstrom*, 442 U.S. at 514 ("whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction"). As there was no way to determine in fact that the jury had not relied upon the presumption, a plurality of the Court had argued reversal was compelled. *See Sandstrom v. Montana*, 442 U.S. at 526 (Brennan, J.) ("'[I]t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside.'"); *Connecticut v. Johnson*, 460 U.S. at 81-88 (Blackmun, J.); *Francis v. Franklin*, 471 U.S. at 323 n.8 (Brennan, J.).

If *Rose v. Clark* did nothing else, it decided against that argument, holding that the *Chapman* harmless error test—which looks to the weight of the record evidence, and tests it by what a reasonable jury would do, not by what the particular jury in fact may have done—*applies*

even in circumstances where the case was submitted to the jury on alternative theories, one of which is constitutionally inadmissible. That is *Rose v. Clark*'s basic holding.

At a minimum, *Bollenbach* is overruled. *Bollenbach* was a rebuttable presumption case[10] in which the challenged instruction produced a guilty verdict within five minutes from the "'hopelessly deadlocked'" jury. The Court reversed without regard for the evidence of guilt. 326 U.S. at 613-14. *Bollenbach* cannot be the law today; *Chapman* would apply. *Rose v. Clark*.

It was the *Rose v. Clark* dissenters, not the majority, who cited *Bollenbach* and insisted that an appellate court has no choice but to reverse where the jury might have relied upon an erroneous instruction or theory. *Rose v. Clark*, 478 U.S. at 590-96 (Blackmun, J., diss.).

The majority responded that the dissent "'asks and answers the wrong question.'" *Id.* at 582 n.11.

> Harmless-error analysis addresses a different question: what is to be done about a trial error that, *in theory*, may have altered the basis on which the jury decided the case, but *in practice* clearly had no effect upon the outcome?

Id. (emphasis added).

The answer was that harmless error doctrine applies: "'*Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless.'" *Id.* at 583. The inquiry must

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10. "I further charge you that possession of stolen property in another State than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case."

Bollenbach, 326 U.S. at 609.

look to the *evidence*, not hypothetical possibilities, determining whether it was so dispositive that the reviewing court can say the jury would have found it unnecessary to rely upon the erroneous instruction. *Id.* at 583. "[I]t is enough to recognize that in some cases that inference is overpowering. It would further neither justice nor the purposes of the *Sandstrom* rule to reverse a conviction in such a case." *Id.* at 581 (citation and footnotes omitted).

The Court reiterated this holding in *Pope v. Illinois*, 481 U.S. at 502-03, and expressly rejected any application of *Chapman* which would look to what the actual jury did, as distinct from what a reasonable jury would do:

> We do not understand *Rose*, as the dissent apparently does, to be based on the fiction that a reviewing court could say beyond all reasonable doubt that the jury *in fact* did not have the impermissible burden-shifting instruction in mind when it concluded that the defendant killed with malice. To say that the jury "would have found it unnecessary to rely on the presumption," or that the impermissible instruction was "superfluous," is not to say that the reviewing court can retrace the jury's deliberative processes but that the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same.

Id. at 503 n.6 (emphasis in original) (citations omitted).

These same principles invalidate *Stromberg v. California*. There are many cases that are put to the jury under alternative theories of guilt which result in a single general verdict. It is a commonplace to prosecute a murder charge, for example, under theories of malice

aforethought, felony murder, and aiding and abetting.[11] Obviously, in many of these cases the evidence supporting one theory will be substantially stronger than evidence supporting another. However, if an element should happen to be incorrectly defined or omitted from the instructions outlining the weakest of the theories, *Stromberg* would mandate reversal despite evidence supporting the other theories so overwhelming that one could reasonably hold the erroneous instruction was "simply superfluous."

The Court recognized in *Rose v. Clark* that "it would defy common sense to conclude that an execution-style killing or violent torture-murder was committed unintentionally." 478 U.S at 581 n.10. In appropriate circumstances, that execution-style killing or torture-murder could well have been charged and tried as both premeditated murder and as felony murder. Should a defect in the felony murder instructions invalidate common sense appraisal of the evidence supporting premeditated murder?

Rose v. Clark involved alternative theories of guilt. The jury could have convicted the defendant either by finding malice or by relying on a presumption of malice. If *Stromberg* remained good law, reversal would have been

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11. Sixth Amendment issues relating to this practice are currently pending before the Court in *Schad* v. *Arizona*, No. 90-5551. California, like many states, has long held that a general charge of murder affords notice of every theory of murder made out by the evidence, and a general verdict of murder supports conviction upon any theory of murder to which the evidence is applicable. California requires unanimity as to the verdict, but not as to the theory. *E.g.*, Cal. Const. art. I, § 16; *People* v. *Thomas*, 43 Cal.3d 818, 829 n.5, 740 P.2d 419, 239 Cal.Rptr. 307 (1987); *People* v. *Guerra*, 40 Cal.3d 377, 386, 708 P.2d 1252, 220 Cal.Rptr. 406 (1985); *People* v. *Watkins*, 195 Cal.App.3d 258, 240 Cal.Rptr. 626 (1987); *People* v. *Williamson*, 90 Cal.App.3d 164, 170, 153 Cal.Rptr. 48 (1979).

compelled, for by definition it was impossible to identify the theory the jury had followed. *Cf. Stromberg v. California*, 283 U.S. at 368. *Rose v. Clark* rejected this result and took the evidence into account, rather than rejecting it as irrelevant.

We do not suggest affirmance is appropriate when a reasonable possibility of a more favorable verdict exists but for the error. We do respectfully maintain that when, after a review of the record pertaining to the constitutionally unimpeached theory of criminal liability, the reviewing court can conclude "beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same," *Chapman* should govern. *See Pope v. Illinois*, 481 U.S. at 503 n.6.

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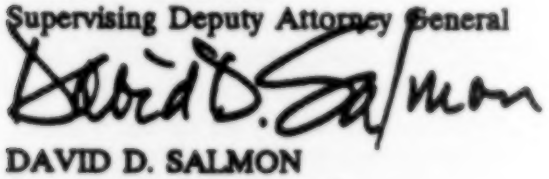
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